Filed 2/7/03 Johnsen v. Transportation Ins. Co. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHRISTOPHER JOHNSEN et al., Plaintiffs and Appellants, v. TRANSPORTATION INSURANCE COMPANY et al., Defendants and Respondents.	G028188 (Super. Ct. No. 780595) O P I N I O N

Appeal from two judgments of the Superior Court of Orange County, David R. Chaffee, Judge. Both judgments affirmed.

Steiner & Libo, Leonard Steiner and Jason D. Carter for Plaintiffs and Appellants.

Hawkins, Schnabel, Lindahl & Beck, Jon Kardassakis and Ram F. Cogan for Defendants and Respondents Transportation Insurance Company, American Casualty Company of Reading, Pa., Alan Cassell, M. F. Bank and Company, Inc., and William Schult.

* * *

I

In July 1996 Christopher Johnsen was severely injured when several trusses, holding up a portion of a warehouse roof on which he was then working, gave way, causing him to fall to the concrete floor below. Eleven months later, in June 1997, Johnsen initially brought this action against five defendants for their negligence in contributing to the collapse of the roof.[1] This appeal, however, concerns only a group of defendants added later, based on a spoliation-of-evidence theory.[2] These defendants prevailed on two summary judgment motions in the wake of a series of appellate cases establishing that there is no tort for either intentional or negligent third-party spoliation of evidence. (E.g., *Coprich v. Superior Court* (2000) 80 Cal.App.4th 1081; *Penn v. Prestige Stations, Inc.* (2000) 83 Cal.App.4th 336; see also *Lueter v. State of California* (2002) (94 Cal.App.4th 1285.)

II

One of Johnsen's theories about the cause of the accident was that certain hangers holding up the trusses split along the nail line because they were designed with precast nail holes running in a single vertical direction. So the trusses themselves were obviously critical to Johnsen's case.

After the accident, Transportation Insurance Company, the insurer for one of the defendants, Standard Structures (who designed the roof) took possession of the trusses, and had them stored with M. F. Bank in Oakland. There were two sets of trusses: (1) Two or three whole trusses, which were trusses that had not failed, were stored at the M.F. Bank warehouse. (2) The remaining trusses were cut in half and stored in a trailer in another storage facility in Oakland.

---

[1] Johnsen's spouse is also a named plaintiff for her loss of consortium. For convenience, however, we will refer to both plaintiffs as "Johnsen" in the singular.

[2] Originally, the appeal also involved DKM Engineers, Inc., but the appeal as to DKM has been dismissed.

In April 1999, Johnsen's counsel called M. F. Bank and learned that the trusses in the trailer had been thrown away. Johnsen's counsel then sought terminating sanctions against Standard Structures, but those were denied. In the process, however, the court observed that it would allow Johnsen to file a complaint for negligent spoliation of evidence, a theory which, at the time, had yet to be repudiated in the courts. In October 1999 Johnsen filed an ex parte motion to file a new complaint, adding several insurance companies and their adjusters, plus M. F. Bank, to the action. That motion was granted, and an amended complaint was on file by the end of November.

The new complaint did *not* assert that the spoliation defendants had ever made a *contract* with Johnsen's counsel to preserve the evidence. The complaint was framed in terms of a duty imposed by law in face of knowledge that Johnsen would be relying on the trusses for his case.

More than seven months later, in mid-June 2000, M. F. Bank and its president made a motion for judgment on the pleadings based on the recent case law holding there was no tort of third-party negligent spoliation. That motion was followed by a summary judgment motion brought by one of the insurers and its adjuster.

The motion for judgment on the pleadings was granted on July 11. Then, on July 18, as an October 30, 2000 trial date loomed ahead, Johnsen's counsel sought leave to amend his complaint to add new causes of action alleging breach of express or implied oral contracts to maintain the trusses during the pendency of the litigation. On the day the trial court granted the summary judgment motion it also denied the request to amend.

Significantly, Johnsen raises no issue in this appeal about the propriety of the summary judgment motion. Rather, he attacks the motion for leave to amend (which also would have the effect of bringing back the M. F. Bank defendants into the case).[3]

III

We affirm because the amendment would have interjected a new, fact-intensive issue into the case just a few months before trial. Because of its fact-intensive nature (it would turn on who said what to whom, and when) the new claim would have required considerable further discovery, including the deposition of Johnsen's trial counsel. Under such circumstances, there was no abuse of discretion in denying the request. (See *Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 692 [long unexcused delay sufficient to uphold discretion to deny amendment motion where it interjects new issue requiring further discovery].)

Indeed, the trial court would have been well within reason to conclude that the amendment was a cynical attempt to take advantage of the one possibility left for third-party liability in the wake of the *Coprich* line of cases, namely, an allegation of a contract to preserve evidence. And the trial court would have been justified in concluding that if there were any facts supporting a contract to preserve evidence, Johnsen's counsel certainly would have known about them in April 1999, when the loss of the trusses was first discovered. Johnsen's counsel could thus have alleged his contract theory much earlier.[4] By keeping that theory back until a few months before

---

[3] Except that M.F. Bank and Company, Inc., itself has declared bankruptcy. In an earlier order, this court stated that the appeal is thus stayed as to M.F. Bank. We need only reiterate here that our decision today does not affect that continuing stay.

[4] The point made by Johnsen's counsel at oral argument that there was no delay because the motion was brought soon after *Coprich* lines of cases became final is unavailing. Any *contract* to preserve evidence still would have been in existence as early as April

trial, Johnsen's counsel prevented the defendants from developing their own fact-based defenses to the alleged contract, or from ascertaining precisely what statements they might have made which formed the basis of the contract theory.[5]

IV

The judgment entered August 30, 2000 in favor of the insurance company spoliation defendants and the judgment entered October 24, 2000 in favor of the storage company spoliation defendants are all affirmed. Respondents shall recover their costs on appeal.

SILLS, P.J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.

1999, and there was no reason that the complaint could not have been amended *at that point* to allege a breach of contract theory.

[5] While we do not have to decide the matter definitively here, the actual allegations in the proposed amended pleadings are pretty weak by way of the merits of a *contract* action. The allegations don't contain anything that looks like an offer or acceptance. At best, they seem to base the contract claim on a promissory estoppel, and even then do not allege any *specific promises* to preserve evidence. It is, of course, cold comfort to Johnsen's counsel to be told now that the contract theory was (probably) a loser anyway.